FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF SANTA ANA,
Petitioner,

vs.

JESS D. HERNANDEZ, TIMOTHY J. GRABER, JIMMY D. DALTON, JOHN T. CHAMBERS, THOMAS W. SKELLY, and WILLIAM A. ZASTROW,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition concerns the federal Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"); specifically, a component of the so-called "salary basis test" in determining whether administrative or executive employees are exempt from the FLSA's overtime rule.

This petition presents a single issue for resolution by this Court: Do the United States Department of Labor ("DOL") FLSA regulations contained in 29 C.F.R. §§ 541.5d and 541.118(a)(5), which require the loss of exempt status when an employee is "subject to" a non-safety disciplinary suspension of less than a pay period, apply only to cases of actual suspension, or does the DOL's interpretation that a personnel rule subjecting employees to discipline alone result in loss of exempt status?

This precise issue is presently before this Court in the case of *Auer, et al v. Robbins, et al.*, 65 F.3d 702 (8th Cir. 1995), *cert. granted*, June 24, 1996, __U.S. __, 116 S.Ct. 2545, (sometimes "*Auer*"). Docket No. 95-897. Oral argument in the *Auer* case was held by this Court on December 10, 1996.

PARTIES TO THE PROCEEDING BELOW

Plaintiffs in the United States District Court for the Central District of California were Jess D. Hernandez, Timothy J. Graber, Jimmy D. Dalton, John T. Chambers, Thomas W. Skelly and William A. Zastrow, all of whom were Battalion Chiefs in the Fire Department of the City of Santa Ana.

Defendant in the District Court was the City of Santa Ana. Each of the six plaintiffs were Appellees/ Cross-Appellants before the United States Court of Appeals for the Ninth Circuit. Appellant/Cross-Appellee in the Ninth Circuit was the City of Santa Ana.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

CITY OF SANTA ANA,
Petitioner,
vs.
JESS D. HERNANDEZ, TIMOTHY J. GRABER,
JIMMY D. DALTON, JOHN T. CHAMBERS,
THOMAS W. SKELLY, and
WILLIAM A. ZASTROW,
Respondents.

PETITION FOR WRIT OF CERTIORARI

The City of Santa Ana, Defendant in the District Court for the Central District of California and Appellant/Cross Appellee in the Ninth Circuit Court of Appeals, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Jess D. Hernandez, et al. v. City of Santa Ana.*

As hereinafter used in this petition, the City of Santa Ana shall be referred to as "Petitioner," and Jess D. Hernandez, Timothy J. Graber, Jimmy D. Dalton, John T. Chambers, Thomas W. Skelly, and William A. Zastrow shall be collectively referred to as "Respondents."

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and reproduced in Appendix B attached to this certiorari petition (hereinafter "Pet. App.").

The District Court's October 12, 1993 Judgment and Findings of Fact and Conclusions of Law are unreported and reproduced in Appendix A attached to this petition.

JURISDICTIONAL AND TIMELINESS STATEMENT

The Ninth Circuit's Memorandum was filed on August 12, 1996. On September 26, 1996, the Ninth Circuit denied Respondents' petition for rehearing and suggestion for rehearing en banc.[1] If filed by December 26, 1996, this petition is timely. Under Rule 13.3 of this Court's rules, the deadline for Petitioner to file its petition is tolled to December 25, 1996, which is 90 days after the date (September 26, 1996) that the Ninth Circuit denied Respondents' petition for rehearing and suggestion for rehearing en banc. *See generally, Missouri v. Jenkins*, 495 U.S. 33, at 46-50 (1990). Since December 25, 1996 is a court and legal holiday, Petitioner would have until the following day (December 26, 1996) in which to file its petition.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

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[1] The Ninth Circuit's September 26, 1996 order is reproduced in Appendix C attached to this opinion. The Ninth Circuit's September 26 order, on its face, is unclear as to whether Petitioner, or Respondents, filed the unsuccessful petition for rehearing and suggestion for rehearing en banc. It was Respondents who filed the unsuccessful petition.

STATUTES AND REGULATIONS

Only one administrative regulation is involved in this petition — 29 C.F.R. § 541.118; specifically, subsection (a)(5). Section 541.118 is reproduced in Appendix D attached to this petition.

STATEMENT OF THE CASE

1. The Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* ("FLSA"), provides a "white collar" exemption for "executive, administrative, and professional employees" as such terms are defined and delimited from time to time by regulations of the Secretary of Labor. 29 U.S.C. § 213(a)(1).

The regulatory pre-conditions to exempt status include two tests: a duties test and a salary basis test. An employer has the burden of establishing that an employee fulfills the requirements of both the duties and salary basis tests prior to exempting that employee from the FLSA's minimum wage and overtime at time and one half rules. *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068, 111 S.Ct. 785 (1991).

A special rule with regard to the application of the salary basis test to public employees allows exempt public employees to be subject to part-day docking for absences for personal reasons of less than one day, but disallows rules making public employees subject to nonsafety related disciplinary pay docking in an FLSA pay period. *See* 29 C.F.R. § 541.118(a)(5). (Pet. App. D)

2. Petitioner's Fire Department employs all six of the Respondents, for all relevant periods, as Battalion

Chiefs. Petitioner treats all Respondents as exempt employees under the FLSA and does not pay them time and one half compensation for overtime. They are considered to be high ranking, command-type members of the Fire Department with much discretionary, managerial authority. Respondents are "subject to" suspension for a period of less than one work week, for reasonable and sufficient cause, for reasons which may or may not constitute infractions of safety rules of major significance. However, none of the Respondents has actually been suspended for a period of less than one work week for any reason. (Pet. App. B)

The matter proceeded to a two-day bench trial on October 5-6, 1993. On October 12, 1993, the District Court entered judgment for Respondents and issued its findings of fact and conclusions of law.

The District Court solely based its decision upon one facet of the salary basis test — the disciplinary suspension provision under 29 C.F.R. § 541.118(a)(5), and ruled that Petitioner had failed to meet this one requirement of the "salary basis" test, specifically 29 C.F.R. § 541.118 (a)(5) (penalties imposed in good faith for infractions of safety rules of major significance). (Pet. App. A)

On August 12, 1996, the Court below upheld the District Court's decision in part and reversed in part. The Court of Appeals agreed with the lower court that Respondents did not meet one component of the "salary basis test"; that is, § 541.118(a)(5). The Court of Appeals found that Respondents were covered by, and subject to, an explicit employment policy authorizing them to be suspended without pay for a period of less than a full work week as a disciplinary measure for nonmajor safety rule violations. The Ninth Circuit further found that the fact that no such suspensions had

actually been implemented by Petitioner did not alter Respondents' nonsalaried status. (Pet. App. B)

3. This petition questions the Court of Appeals' application of the § 541.118(a)(5) component of the salary basis test. The Ninth Circuit relied upon its earlier decision in *Hurley v. Oregon*, 27 F.3d 392, 394 (9th Cir. 1994). The Ninth Circuit found that although there is an exception for violations of "safety rules of major significance," employees whose compensation is "subject to" reduction based upon a violation of any other rules are ordinarily considered nonsalaried and are entitled to overtime.

4. Petitioner seeks this Court's review of the holding of the Ninth Circuit with regard to the salary basis test, specifically, its application of the "disciplinary docking rule" found in 29 C.F.R. § 541.118(a)(5).

REASON FOR GRANTING THE PETITION

A FUNDAMENTAL CONFLICT EXISTS AMONG THE COURTS OF APPEALS CONCERNING THE "DISCIPLINARY DOCKING RULE" COMPONENT OF THE FLSA SALARY BASIS TEST.

There presently exists a split of authority among the circuits concerning the "disciplinary docking rule" component [29 C.F.R. §541.118(a)(5)] of the FLSA salary basis test.

The Fifth Circuit [*York v. Wichita Falls*, 944 F.2d 236 (5th Cir. 1991), *on remand* 856 F.Supp. 1191, *affirmed*, 48 F.3d 919 (5th Cir. 1995)], Eighth Circuit [*Auer v. Robbins, supra*] and Eleventh Circuit, [*Atlanta Professional Firefighters v. Atlanta*, 920 F.2d 800 (11th Cir.

1994)], all require evidence of an "actual deduction" of an employee's pay, for less than a workweek, for that employee's violation of a rule *other* than a safety rule of major significance, before that employee loses his or her exempt status under the FLSA. In other words, the Fifth, Eighth and Eleventh Circuits have all held that the "mere possibility," under 29 C.F.R. § 541.118(a)(5), of an improper deduction, does not defeat the employee's salaried status. Petitioner agrees with the position taken by the Fifth, Eighth and Eleventh Circuits.

On the other hand, the Second Circuit [*Martin v. Malcom Pernie*, 949 F.2d 611 (2nd Cir. 1991), *cert. denied*, __U.S.__, 113 S.Ct. 298, 121 L.Ed.2d 222 (1992)], D.C. Circuit [*Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993)], Fourth Circuit [*Shockley v. Newport News*, 997 F.2d 18 (4th Cir. 1991)], Sixth Circuit [*Michigan Ass'n of Government Employees v. Dept. of Corrections*, 992 F.2d 82 (6th Cir. 1993)], Seventh Circuit [*Klein v. Rush-Presbyterian*, 990 F.2d 279 (7th Cir. 1993)], and Ninth Circuit [*Abshire v. County of Kern, supra*, and *Hurley v. Oregon, supra*] have adopted a rule that an employer's policies making an employee's compensation "subject to" deduction, and not an actual deduction, for violating rules other than nonsafety rules, renders that employee as being paid on an hourly basis and subject to the FLSA's overtime pay requirements. In the case at bar, the Ninth Circuit relied on its earlier ruling in the *Hurley* case, and allied itself with the Second, D.C., Fourth, Sixth and Seventh Circuits on this issue.

EVENTUAL DISPOSITION OF THIS CASE IF CERTIORARI IS GRANTED

Assuming that its petition is granted, Petitioner recognizes that the eventual disposition of this case will depend upon how this Court rules in the *Auer* case.

If this Court, in *Auer*, rules in the employer's favor concerning § 541.118(a)(5)'s disciplinary docking rule, thus upholding Petitioner's position in this case, Petitioner would ask that this Court remand this case to the Ninth Circuit to vacate its August 12, 1996 decision and to reconsider its decision in light of this Court's decision in *Auer*.

If, on the other hand, this Court, in *Auer*, upholds the position of the employees regarding § 541.118(a)(5)'s disciplinary docking rule, thus rejecting Petitioner's position in this case, Petitioner would request that this Court remand this case to the Ninth Circuit with instructions to reissue its August 12, 1996 opinion.

CONCLUSION

As matters presently stand, Petitioner is subject to payment of an approximate $170,000 (exclusive of prejudgment interest, post judgment interest and attorneys' fees) collective judgment in favor of Respondents. In light of the fact that there is no evidence that Petitioner has ever treated Respondents as nonsalaried employees, such as by suspending them for less than a work week for something other than a major safety rules violation, the decision below represents a manifest injustice.

For all the foregoing reasons, Petitioner respectfully requests that this petition for a writ of certiorari be granted.

Dated: December 20, 1996.

Respectfully submitted,

JOSEPH W. FLETCHER
City Attorney

ROBERT J. WHEELER
Counsel of Record
Assistant City Attorney

Attorneys for Petitioner
CITY OF SANTA ANA

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIORNIA

FILED
OCT 12 1993
Clerk, U.S. District Court
Central District of California
Santa Ana Office
By /s/ Deputy

JESS D. HERNANDEZ, TIMOTHY J. GRABER, JIMMY D. DALTON, JOHN T. CHAMBERS, THOMAS W. SKELLY, and WILLIAM A. ZASTROW,
Plaintiffs,
v.
CITY OF SANTA ANA,
Defendant.

No. SA CV 92-622-LHM

JUDGMENT

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

In accordance with the Court's Findings of Fact and Conclusions of Law filed herein following the trial of this action,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Plaintiff Jess D. Hernandez have and recover from Defendant City of Santa Ana the sum of $46,563.60,

plus prejudgment interest in the amount of $ _____, plus all recoverable Court costs incurred by Plaintiff Jess D. Hernandez in the amount of $ _____, plus reasonable attorneys' fees incurred by Plaintiff Jess D. Hernandez in the amount of $ _____.

2. Plaintiff Timothy J. Graber have and recover from Defendant City of Santa Ana the sum of $38,075.11, plus prejudgment interest in the amount of $ _____, plus all recoverable Court costs incurred by Plaintiff Timothy J. Graber in the amount of $ _____, plus reasonable attorneys' fees incurred by Plaintiff Timothy J. Graber in the amount of $ _____.

3. Plaintiff Jimmy D. Dalton have and recover from Defendant City of Santa Ana the sum of $43,962.14, plus prejudgment interest in the amount of $ _____, plus all recoverable Court costs incurred by Plaintiff Jimmy D. Dalton in the amount of $ _____, plus reasonable attorneys' fees incurred by Plaintiff Jimmy D. Dalton in the amount of $ _____.

4. Plaintiff John T. Chambers have and recover from Defendant City of Santa Ana the sum of $35,820.54, plus prejudgment interest in the amount of $ _____, plus all recoverable Court costs incurred by Plaintiff John T. Chambers in the amount of $ _____, plus reasonable attorneys' fees incurred by Plaintiff John T. Chambers in the amount of $ _____.

5. Thomas W. Skelly have and recover from Defendant City of Santa Ana the sum of $41,758.12, plus prejudgment interest in the amount of $ _____, plus all recoverable Court costs incurred by Plaintiff Thomas W. Skelly in the amount of $ _____, plus reasonable attorneys' fees incurred by Plaintiff Thomas W. Skelly in the amount of $ _____.

6. Plaintiff William A. Zastrow have and recover from Defendant City of Santa Ana the sum of $38,827.60, plus prejudgment interest in the amount of $ _____, plus all recoverable Court costs incurred by Plaintiff William A. Zastrow in the amount of $ _____, plus reasonable attorneys' fees incurred by Plaintiff William A. Zastrow in the amount of $ _____.

DATED: 10/12/93

/s/ McLaughlin
LINDA H. McLAUGHLIN
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIORNIA

FILED
OCT 12 1993
Clerk, U.S. District Court
Central District of California
Santa Ana Office
By /s/ Deputy

JESS D. HERNANDEZ, TIMOTHY J. GRABER, JIMMY D. DALTON, JOHN T. CHAMBERS, THOMAS W. SKELLY, and WILLIAM A. ZASTROW,
Plaintiffs,
v.
CITY OF SANTA ANA,
Defendant.

No. SA CV 92-662-LHM

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

This matter came on for trial on October 5, 1993, before the Honorable Linda H. McLaughlin, United States District Judge, with all parties being represented by their counsel. Based on all matters properly a part of the record, the Court makes the following Findings of Fact and Conclusions of Law:

1. The parties stipulated to Findings of Fact 2, 3, and 4 set forth below.

2. Plaintiffs Hernandez, Graber, Dalton, Chambers, Skelly and Zastrow ("Plaintiffs") are Battalion Chiefs employed by the Fire Department of Defendant City of Santa Ana. Each of the Plaintiffs has been employed by Defendant as a Battalion Chief continuously since October 8, 1990.

3. Pursuant to the City's Charter, Plaintiffs may be suspended from duty without pay for periods of less than one week as a disciplinary measure for reasonable and sufficient cause, which includes, but is not limited to, sexual harassment, unexcused absences of more than one day, and other reasons that may or may not be infractions of safety rules of major significance. None of the Plaintiffs has actually been suspended in this manner.

4. The amount of overtime worked by each of the Plaintiffs from October 8, 1990 to October 2, 1993 is set forth in Plaintiffs' Exhibit 121-A. According to the computations and figures agreed upon by the parties, the following is the amount of overtime pay due to the individual Plaintiffs:

John T. Chambers	$ 35,820.54
Jimmy D. Dalton	$ 43,962.14
Timothy J. Graber	$ 38,075.11
Jess D. Hernandez	$ 46,563.60
Thomas W. Skelly	$ 41,758.12
William A. Zastrow	$ 38,827.60

5. Defendant City of Santa Ana applied the Fair Labor Standards Act (FLSA) to its personnel after the United States Supreme Court's decision in *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005 (1985).

6. Shortly after the Ninth Circuit's decision in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), the City Manager's office reviewed the City's policies and, in response to the *Abshire* decision, issued a written administrative policy statement to all city department executives on June 19, 1991, instructing them that "absences of less than one workday, on the part of the City's unrepresented and represented management personnel, shall under no circumstances be treated as an absence without pay."

7. Any conclusion of law more appropriately designated as a finding of fact is incorporated herein as a finding of fact.

CONCLUSIONS OF LAW

1. This court has jurisdiction under 28 U.S.C. § 1337(a) and 29 U.S.C. § 216(b)

2. Venue is proper in the Central District of California under 28 U.S.C. § 1391.

3. The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq., requires employers to provide overtime compensation for any hours worked in excess of a workweek prescribed under the Act. 29 U.S.C. § 207. However, workers who are "employed in a bona fide executive" capacity are exempt from the overtime compensation requirements of the FLSA. 29 U.S.C. § 213(a)(1).

4. The administrative regulations promulgated pursuant to the FLSA establish a "duties" test and a "salary basis" test for determining whether an employee is a "bona fide executive." *See* 29 C.F.R. §§ 541.1(a)-(f), 541.118, 541.119.

5. In order to establish an exemption from the FLSA's overtime requirements for Plaintiffs, Defendant City of Santa Ana must prove that Plaintiffs meet both the "duties" test and the "salary basis" test. *Abshire v. County of Kern*, 908 F.2d 483, 484 (9th Cir. 1990); *see Corning Glass Works v. Brennan*, 417 U.S. 188, 196-197, 94 S.Ct. 2223, 2229 (1974) (employer has burden of proving that an employee is exempt under the FLSA). Exemptions to the FLSA are to be narrowly construed in order to further Congress' goal of providing broad federal employment protection. *Id.* at 485.

6. To satisfy the "salary basis" test, Defendant City must prove that Plaintiffs regularly receive, each pay period, "a predetermined amount constituting all or part of [their] compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a). Deductions which may be made from an employee's compensation without affecting his or her exempt status are found in 29 C.F.R. §§ 541.118(a)(2) (absences for a day or more for personal reasons other than sickness or accident), (3) (absences for a day or more occasioned by sickness or disability) and (5) (penalties imposed in good faith for infractions of safety rules of major significance).

7. The Department of Labor's Wage and Hour Administrator has stated that, under the "salary basis" test, "The only disciplinary type of deduction permissible is one imposed as a penalty 'in good faith for infractions of safety rules of major significance.' " Wage & Hour Op. Ltr. No. 1725 (90-42NR) (Mar. 29, 1991) (quoting 29 C.F.R. § 541.118(a)(5)). Every federal court that has considered this issue has reached the same conclusion as the Wage and Hour Administrator. *See, e.g., Shockley v. City of Newport News*, 997 F.2d 18, 24-25 (4th Cir. 1993); *Klein v. Rush-Presbyterian-St. Luke's Medical*

Ctr., 990 F.2d 279, 285 (7th Cir 1993); *Lucero v. Regents of the University of California*, No. C-91-3999-MHP, 1993 WL 341287 (N.D.Cal Aug. 23, 1993); *Benzler v. State of Nevada*, 804 F.Supp. 1303, 1307 (D.Nev. 1992); *Service Employees Intern v. County of San Diego*, 784 F.Supp. 1503, 1511 (S.D.Cal. 1992). Furthermore, the Court accords substantial deference to the Department of Labor's interpretation of its own regulations, although it is not binding on the district court. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140, 65 S.Ct. 161, 164 (1944); *Klein v. Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d at 285.

8. Additionally, an exempt employee may be suspended without pay for a *full* week without affecting the employee's exempt status, because "an employee need not be paid for any workweek in which he performs no work." 29 C.F.R. § 541.118(a); 29 U.S.C. § 207(a)(1); Wage & Hour Op. Ltr. No. 1725 (90-42NR) (Mar. 29, 1991).

9. Accordingly, an employee whose pay is subject to deductions of less than a full week's pay, other than those permitted by 29 C.F.R. § 541.118(a)(5), is (i) not paid "on a salary basis" within the meaning of the FLSA and its corresponding regulations and (ii) not exempt from the overtime compensation requirements of 29 U.S.C. § 207.

10. Applying the established law as set forth above, the Court must find in favor of the Plaintiffs. It is undisputed that Plaintiffs were subject to suspensions without pay for periods less than one week for reasons other than violation of safety rules of major significance. Therefore, the Court finds that the Plaintiffs were not paid "on a salary basis" within the meaning of the FLSA and its corresponding regulations. Accordingly, the Plaintiffs are entitled to recover the back overtime wages due to them under 29 U.S.C. § 207(a).

11. Defendant's administrative policy statement, dated June 10, 1991, ensured that otherwise exempt city managerial employees would not be subject to reductions in pay for absences from work of less than one day's duration. This policy statement addresses the factual situation of *Abshire v. County of Kern*. The policy statement did not address, nor did it eliminate, the City's policy that employees, including the Plaintiffs, were subject to suspensions without pay for periods of less than one week for reasons other than violation of safety rules of major significance. It is the latter policy which makes Plaintiffs non-exempt employees and entitles them to recover the back overtime wages due to them under the FLSA.

12. Plaintiffs are entitled to recover reasonable attorney's fees and costs. 29 U.S.C. § 216(b); *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 734 n.8, 101 S.Ct. 1437, 1441 n.8 (1981).

13. Plaintiffs are entitled to recover prejudgment interest on the back wages due. *Martin v. The Refrigeration School, Inc.*, 968 F.2d 3, 9 (9th Cir. 1992); *Ford v. Alfaro*, 785 F.2d 835. 842 (9th Cir. 1986).

14. Defendant City needed to prove that the Plaintiffs met both the "salary basis" test and the "duties" test to establish that the Plaintiffs were exempt employees and not entitled to back overtime wages. Because the Defendant City failed to prove that the Plaintiffs met the "salary basis" test, the Plaintiffs prevail and the Court need not consider whether the Plaintiffs would be exempt under the "duties" test.

15. The Court finds that Defendant City acted reasonably and in good faith, albeit erroneously, in treating the Plaintiffs as if they were exempt from the overtime compensation requirements of the FLSA. Accordingly, no liquidated damages are awarded to Plaintiffs pursuant to 29 U.S.C. § 216(b).

16. Any finding of fact more appropriately designated as a conclusion of law is incorporated herein as a conclusion of law.

DATED: 10/12/93

/s/ McLaughlin
LINDA H. McLAUGHLIN
United States District Judge

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
August 12, 1996
Cathy A. Catterson, Clerk
U.S. Court of Appeals

JESS D. HERNANDEZ, TIMOTHY J. GRABER, JIMMY D. DALTON, JOHN T. CHAMBERS, THOMAS W. SKELLY, and WILLIAM A. ZASTROW,
Plaintiffs-Appellees,
v.
CITY OF SANTA ANA,
Defendant-Appellant.

No. 93-56624/93-56713
D.C. No. CIV 92-00662-LHM

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Linda H. McLaughlin, District Judge, Presiding

Argued and Submitted July 10, 1996
Pasadena, California

Filed

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* This disposition is not suitable for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: FERNANDEZ and TASHIMA, Circuit Judges, and MERHIGE, Senior District Judge.**

The Appellant City of Santa Ana (the "City") appeals from the judgment of the district court awarding the Appellees, Jess D. Hernandez, Timothy J. Graber, Jimmy D. Dalton, John T. Chambers, Thomas W. Skelly and William A. Zastrow, the battalion chiefs in the City's fire department (the "Fire Chiefs") overtime compensation in their action under The Fair Labor Standards Act, 29 U.S.C. §201, *et seq.* (the "FLSA").

I.

The Fire Chiefs filed this FLSA action seeking back overtime pay on October 8, 1992. On October 5, 1993 the matter was before the district court for a two-day bench trial. The district court made the following factual findings, none of which appear to be challenged on this appeal.

Hernandez, Graber, Dalton, Chambers, Skelly and Zastrow are Battalion Chiefs who have been employed by the City continuously since October 8, 1990.

Pursuant to the City's Charter, the Fire Chiefs may be suspended from duty without pay for periods of less than one week as a disciplinary measure for reasonable and sufficient cause which includes, but is not limited to, sexual harassment, unexcused absences of more than one day, and other reasons that may or may not be infractions of safety rules of major significance.

None of the Fire Chiefs has actually been suspended in this manner.

** The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

II.

Under the FLSA, employees must ordinarily be paid overtime compensation if they work more than forty hours in one week. 29 U.S.C. § 207(a)(1). However, the FLSA exempts from its overtime rule "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Employees fit within the overtime-exempt category for administrative or executive employees where they meet both of two tests: a "duties test" and a "salary test." *Barner v. City of Novato*, 17 F.3d 1256, 1259-60 (9th Cir. 1994).

In this case the district court concluded that the Fire Chiefs were entitled to overtime compensation solely because they did not meet the "salary test." The district court did not reach the issue of the "duties test." We conclude that the district court did not err when it determined that the Fire Chiefs did not meet the "salary test" and were, accordingly, not exempt from the FLSA requirement that they receive overtime compensation.

As this Court explained in *Hurley v. Oregon*, 27 F.3d 392, 394 (9th Cir. 1994), the reasoning behind the "salary test" is that an employee compensated on a "salary test" is ordinarily a "bona fide" executive, administrator, or professional whereas an employee whose compensation is subject to reductions is generally entitled to overtime compensation. *Id.* at 394. However, while there is an exception for salary reductions for violations of "safety rules of major significance," "[e]mployees whose compensation is subject to reduction based on a violation of any other rules are ordinarily considered non-salaried and are entitled to overtime." *Id.* In this case the Fire Chiefs were covered by, and subject to, an explicit employment policy authorizing them to be suspended without pay for a period of less than a full workweek as a disciplinary measure for

non-major safety violations. The fact that no such suspensions may have been implemented by the City does not alter the Fire Chiefs' non-salaried status. *See id.* at 395 n.7.

The district court awarded the Fire Chiefs overtime compensation for the period from October 8, 1990 to October 2, 1993. This judgment must be modified in light of this Court's holding in *Service Employees International Union, Local 102 v. County of San Diego*, 60 F.3d 1346 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 774 (1996).[1] In *SEIU* this Court held that, prior to September 6, 1991, public sector employees did not have to meet the "salary test" in order to fall within the executive and administrative exemption. Accordingly, the district court's determination as to the pre September 6, 1991 period must be set aside and the case returned to the district court for consideration of whether the Fire Chiefs met the "duties" test for this period.

The City shall bear the costs of appeal.

III.

The judgment of the district court is **AFFIRMED IN PART** as to the award of overtime compensation for the period beginning on September 6, 1991. The judgment of the district court as to the pre-September 6, 1991 period is **VACATED and REMANDED** for consideration of whether the "duties" test has been met. The Fire Chiefs have abandoned their cross-appeal and it is hereby dismissed.

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[1] *SEIU* was not decided until after the district court had ruled in this case.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
SEP 26, 1996
Cathy A. Catterson, Clerk
U.S. Court of Appeals

JESS D. HERNANDEZ, TIMOTHY J. GRABER, JIMMY D. DALTON, JOHN T. CHAMBERS, THOMAS W. SKELLY, and WILLIAM A. ZASTROW,
Plaintiffs-Appellees,
v.
CITY OF SANTA ANA,
Defendant-Appellant.

No. 93-56624
D.C. No. CV 92-00662-LHM

ORDER

Before: FERNANDEZ and TASHIMA, Circuit Judges, and MERHIGE, Senior District Judge.*

The panel has unanimously voted to deny the appellant's petition for rehearing. The suggestion for rehearing en banc was circulated to the active judges of the court, and no judge requested a vote for en banc consideration.

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* Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX D

CODE OF FEDERAL REGULATIONS

§ 541.118 Salary basis.

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's

particular plan, policy or practice provides compensation for such absences, deductions for absences of a day or longer because of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he has exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such days or days for which he receives compensation for leave under such plan, policy or practice. Similarly, if the employer operates under a State sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of a working day or longer if benefits are provided in accordance with the particular law or plan. In the case of an industrial accident, the "salary basis" requirement will be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the employer, provided the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were bring made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

(b) *Minimum guarantee plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $155 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of

circumventing the requirement of payment "on a salary basis." For example, a salary of $200 in each week in which any work is performed, and an additional $50 which is made subject to deductions which, are not permitted under paragraph (a) of this section.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7092, Feb 19, 1975]

Effective Date Note: Paragraph (b) in § 541.118 was revised at 46 FR 3014, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraph (b) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.118 Salary basis.

* * * * *

(b) *Minimum guarantee plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $250 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the

employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis." For example, a salary of $300 in each week in which any work is performed, and an additional $55 which is made subject to deductions which are not permitted under paragraph (a) of this section.

(c) *Initial and terminal weeks.* Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7092, Feb. 19, 1975]